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BY an unpardonable inadvertence we failed in our last number to note the appointment of the Hon. A. A. Phlegar, of Bristol, to the position of Judge of the Supreme Court of Appeals of Virginia, to fill the vacancy caused by the death of the late Judge Riely.

In the estimation of his professional brethren, no lawyer stands higher in this State than Judge Phlegar, whether measured as a man or as a lawyer, and we have every assurance that he will prove worthy of the high position, and a fit successor of the lamented judge whose place he is thus called to fill.

IN an action by the purchaser for the breach of warranty of quality on a sale of property, the courts are generally agreed that the measure of damages is the difference between the contract price and the reasonable market value of the property, had the warranty been true. Where, however, the action is for deceit in such case, there is much lack of harmony in the authorities—one view being that the same measure of damages is applicable as in contract, while the other is that the damages are to be measured by the actual loss sustained by reason of the deceit, excluding any expected profit. According to the latter view, the question is, not what the plaintiff would have gained had the warranty been true, but what loss has he suffered by reason of its being untrue.

In the recent case of *Singafus* v. *Porter* (October 29, 1900), in the Supreme Court of the United States, the plaintiff sued in deceit for false representations in the sale of a mine. The lower court certified to the Supreme Court the question whether in such case the measure of damage was "the difference between the value of the property as it proved to be and as it would have been as represented," or whether it was "the money plaintiffs had paid out for the mine, with interest, and any other outlay legitimately attributable to defendant's fraudu-

lent conduct, less the actual value of the mine when the plaintiffs bought it."

The court held, Mr. Justice Harlan delivering the opinion, that the latter was the true measure of damages—thus affirming *Smith* v. *Bolles*, 132 U. S. 125. Mr. Justice Brown and Mr. Justice Peckham dissented.

IN *Scranton* v. *Wheeler* (U. S. Supreme Court, Nov. 12, 1900), the court dealt with an interesting question under that clause of the Constitution forbidding the taking of private property for public use without just compensation. The plaintiff owned lands bordering on a navigable river, and the United States government, for the purpose of improving navigation, constructed a pier in the river opposite the plaintiff's property, thereby cutting off access to the navigable portion of the river.

The court held (Mr. Justice Harlan delivering the opinion), that whether the title to the bed of the stream were in the State or in the plaintiff, it was held subject to the paramount right of the public to use the stream for purposes of navigation, and that the incidental loss to the riparian owner of access to navigability, in the course of the improvement of the stream for purposes of navigation, was not a taking of private property, but a consequential injury only—an injury subject to the possibility of which all proprietors acquire and hold riparian lands.

The court had previously held in *Pumpelly* v. *Green Bay Co.*, 13 Wall. 166, where the property of the riparian owner was actually invaded by a permanent overflow, consequent upon improvements made by public authority for purposes of navigation, that this amounted to a "taking" for which compensation must be made. There being here an actual invasion of the plaintiff's property, this case is easily distinguishable from the other.

On the other hand, in *Gibson* v. *U. S.*, 166 U. S. 269, it was held that the construction of a dike by the government, in the bed of the Ohio river, seriously interfering with the riparian owner's access to the navigable portion of the stream, and causing heavy depreciation in the value of the property, was not a taking of private property, and no compensation could be recovered therefor. The decision in this case was held to rule that in the principal case.

The principle applied in these cases seems analogous to that applicable to damage done to abutting proprietors by the grading of streets.

Here, although the abutter owns the fee in the street, the rights of the public are paramount, and when the municipal authorities, under proper legislative sanction, and in a proper manner, proceed to grade the streets for the convenience of the traveling public, the consequential injury to the abutter is not a "taking" in the constitutional sense; and the city is under no obligation to make compensation, howsoever seriously the value of the abutting property may have been affected. *Powell* v. *Wytheville*, 95 Va. 73; *Northern Transp. Co.* v. *Chicago*, 99 U. S. 635; note to *O'Brien* v. *Philadelphia*, 29 Am. St. Rep. 835–850, collecting the authorities.

An editorial note to *Gibson* v. *U. S.* (*supra*), as reported in Book 41 of Lawyers' Ed. p. 996, collates the authorities on the general subject of the rights of riparian owners in navigable waters.